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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

FRED W. NELSON, as Chairman of the Iowa State Tax Commission, et al.,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

PETITION FOR REHEARING.

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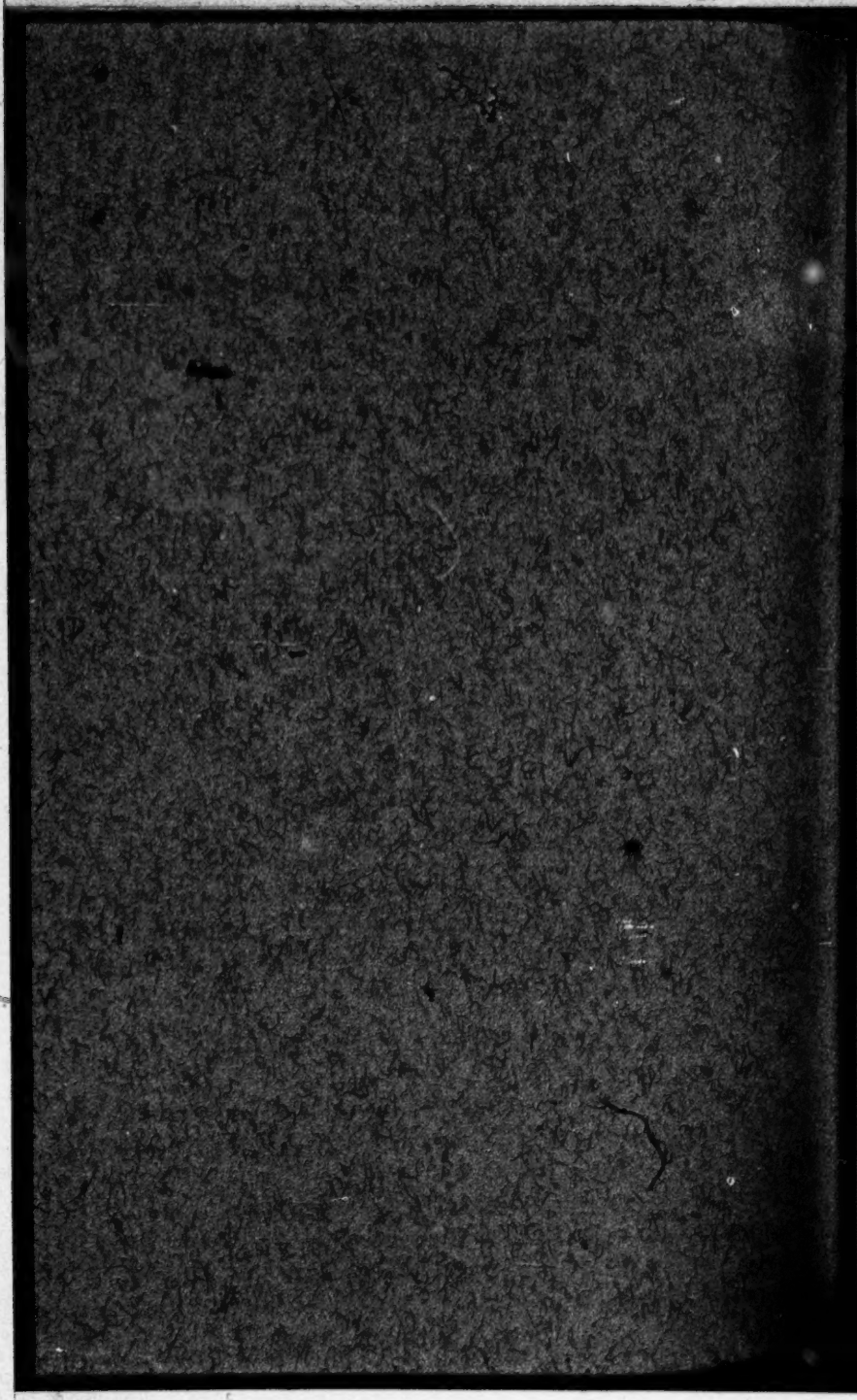

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PETITION FOR REHEARING.

Comes now the above-named respondent, Sears, Roebuck and Co., and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

BRIEF STATEMENT OF THE CASE.

This suit sought to enjoin the petitioners, as members of the Iowa State Board of Assessment and Review from enforcing as against respondent, Sears, Roebuck and Co., insofar as its purely interstate mail order sales to residents of Iowa are concerned, the provisions of Chapter 198 of the Laws of the Forty-seventh General Assembly of Iowa, commonly known as the "Use Tax Act", and from taking

steps to cause the revocation of its permit to do business within the State of Iowa as a foreign corporation or to cancel licenses which had been issued to it as a retail merchant in connection with the operation of its twelve retail stores in Iowa.

The respondent maintained that the Iowa Use Tax Act, as applied to the interstate mail order business of respondent, operated extra-territorially and regulated activities of respondent performed wholly without the confines of the State of Iowa, and is unconstitutional and void because it is in contravention of the due process clause of the 14th Amendment to the Constitution of the United States, and is further a burden upon interstate commerce contrary to the provisions of Section 8 of Article I of the Constitution of the United States. The pertinent provisions of the act and the statement of facts are found on pages 3 to 13 of respondent's brief in this court.

GROUNDS UPON WHICH THE PETITION IS BASED.

I.

This Court Erred in Assuming That the Sales in Controversy in This Case Were a Part of Respondent's Iowa Business When in Fact the Iowa Supreme Court Had Expressly Found That These Sales Were Wholly Unrelated to Respondent's Iowa Business.

Argument in Support of Ground No. I.

In the majority opinion this court makes this statement:

"Yet these orders are still a part of respondent's Iowa business. * * * Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually

solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

In making this statement, this court indulges in an assumption which is not only contrary to the facts disclosed by the record in this case, but which is also directly contrary to the facts as found by the Iowa Supreme Court. In its opinion the Iowa Supreme Court, speaking through Mr. Justice Miller, makes the following statement:

> "The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from the plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa."

This quotation is a definite and succinct statement that these mail order sales are wholly extra-territorial in nature; that they in no way represent any activity upon the part of respondent in the State of Iowa, and that they do not constitute doing business within that state. The assumption to the contrary indulged in by this court is therefore in total and direct conflict with the finding of fact made by the Iowa Supreme Court, and it is an assumption in which this court should not indulge. It has been repeatedly held that in cases coming from a state court, this court does

not review questions of fact but accepts the conclusions of the state tribunals as final.

Chrisman v. Miller, 197 U. S. 313; 49 L. ed. 770.
Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94; 63 L. ed. 863.
Smiley v. Kansas, 196 U. S. 447; 49 L. ed. 546.
Interstate Amusement Co. v. Albert, 239 U. S. 560; 60 L. ed. 439.

This latter case is indeed pertinent because it demonstrates the finality of a finding by the Supreme Court of the State of Tennessee that a certain corporation was "doing business in that state". In its opinion the court said:

> "It is settled that such findings of fact, in ordinary cases other than those arising under the 'contract clause' of the Constitution, are binding upon this court. * * *
>
> There being adequate support in the record for the finding of the supreme court of the state that plaintiff in error was doing business in the state, other than interstate commerce, without complying with the statute quoted, the contentions based upon the commerce clause and the due process clause alike must fall."

Under the above case the question of whether or not a corporation is "doing business" within a state is a question of fact to be finally decided by the state supreme court. In the *Interstate Amusement* case there was a finding by the state supreme court that the corporation was doing business within the state of Tennessee, and this court acknowledged that that finding of fact was final. In the instant case the Supreme Court of Iowa has found that respondent's mail order sales do not constitute doing business within the state of Iowa, and are not a part of respondent's Iowa business. Why is this finding of fact not entitled to the same weight as the finding of the Tennessee Supreme Court in the *Interstate Amusement Co.* case? No suggestion is made by this court that the state court's findings were not adequately supported by the record. Instead, this court has

ignored the findings of fact made by the state court and has rested its conclusions upon unjustified assumptions. Because the sales in question are interstate in character and because they are unrelated to any portion of respondent's Iowa business, it follows that the act in question is unconstitutional and the judgment of the Iowa Supreme Court should be affirmed.

II.

The Court Erred in Holding that, Because the State of Iowa Had Extended to Respondent the Privilege of Doing Business in Iowa as a Foreign Corporation, it Has the Power at a Later Date to Withdraw This Privilege if Respondent Refused to Comply With the Provisions of this Unconstitutional Exaction.

Argument in Support of Ground No. II.

In its opinion, this court states that because respondent had qualified as a foreign corporation to do business in Iowa and in fact was doing business in that state in its retail stores, the State of Iowa had the power at a later date, as a price for enjoying this privilege, to exact a tax upon its interstate transactions which are wholly unrelated to any phase of its Iowa business. Until the decision in this case, it had been firmly established that the privilege granted to a corporation to carry on business within a state could not be withheld or withdrawn solely because the corporation failed to perform duties required under an unconstitutional legislative enactment. In this case, the State of Iowa, having first granted the respondent the privilege of doing business in Iowa, later decides to withdraw this privilege because respondent does not collect and pay a tax upon mail order sales which are unrelated to its Iowa business. The mail order portion of respondent's business is interstate in character and it cannot be regulated, or bur-

dened, or taxed, simply because it so happens that respondent enjoys the privilege of doing another type of business in that state.

That the mail order portion of respondent's business is interstate in character and not subject to regulation, is indeed demonstrated by the opinion of this court itself. In this opinion the following statement is found:

> "Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out-of-state mail order houses which need not and do not collect the tax on their Iowa sales. *But those other concerns are not doing business in the state as foreign corporations.* Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price." (Italics ours)

Here, then, is a definite finding that other corporations making sales by mail in exactly the same manner as the mail order sales made by respondent, cannot be made the collectors of this tax because these other corporations are not doing business in Iowa. But neither is respondent doing business in Iowa with respect to the mail order sales here in question. Respondent's mail order sales are just as interstate in character as are those of other corporations which happen not to be qualified to do business in Iowa. Under the repeated holdings of this court these sales cannot be taxed solely because of the fact that respondent has qualified to do business in the state of Iowa.

See—

Terral v. Burke Construction Co., 257 U. S. 529 (overruling *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246).

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. ed. 664, in which the court, speaking through the late Mr. Justice Holmes, said:

"Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. *Frick v. Pennsylvania*, June 1, 1925 (268 U. S. 473, 69 L. ed. 1058, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603); *American Bank & T. Co. v. Federal Reserve Bank*, 256 U. S. 350, 358, 65 L. ed. 983, 989, 25 A. L. R. 971, 41 Sup. Ct. Rep. 499; *Badders v. United States*, 240 U. S. 391, 394, 60 L. ed. 706, 708, 36 Sup Ct. Rep. 367; *United States v. Reading Co.*, 226 U. S. 324, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court. (*Terral v. Burke Constr. Co.*, 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 180, 42 Sup. Ct. Rep. 188); or to tax it upon property that by established principles the state has no power to tax (*Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190), and other cases in the same volume and later that have followed it; or to interfere with interstate commerce (*Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57; *Looney v. Crane Co.*, 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 114, 62 L. ed. 1006, 1016, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 436). A state cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the state making the attempt. *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 646, 38 L. ed. 846, 852, 14 Sup. Ct. Rep. 952.

The case last cited was one of an attempt to regulate the corporation's payments in another state. By

the same principle on even stronger grounds the corporation cannot be prevented from employing and paying those whom it needs for its business outside the state."

See also—

New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. ed. 1259.

Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. ed. 673.

The decision in the instant case departs from precedent of many years' standing. It should be reargued so that the importance of the principles which are being overturned can again be presented to this court.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Iowa Supreme Court be, upon further consideration, affirmed.

Respectfully submitted,

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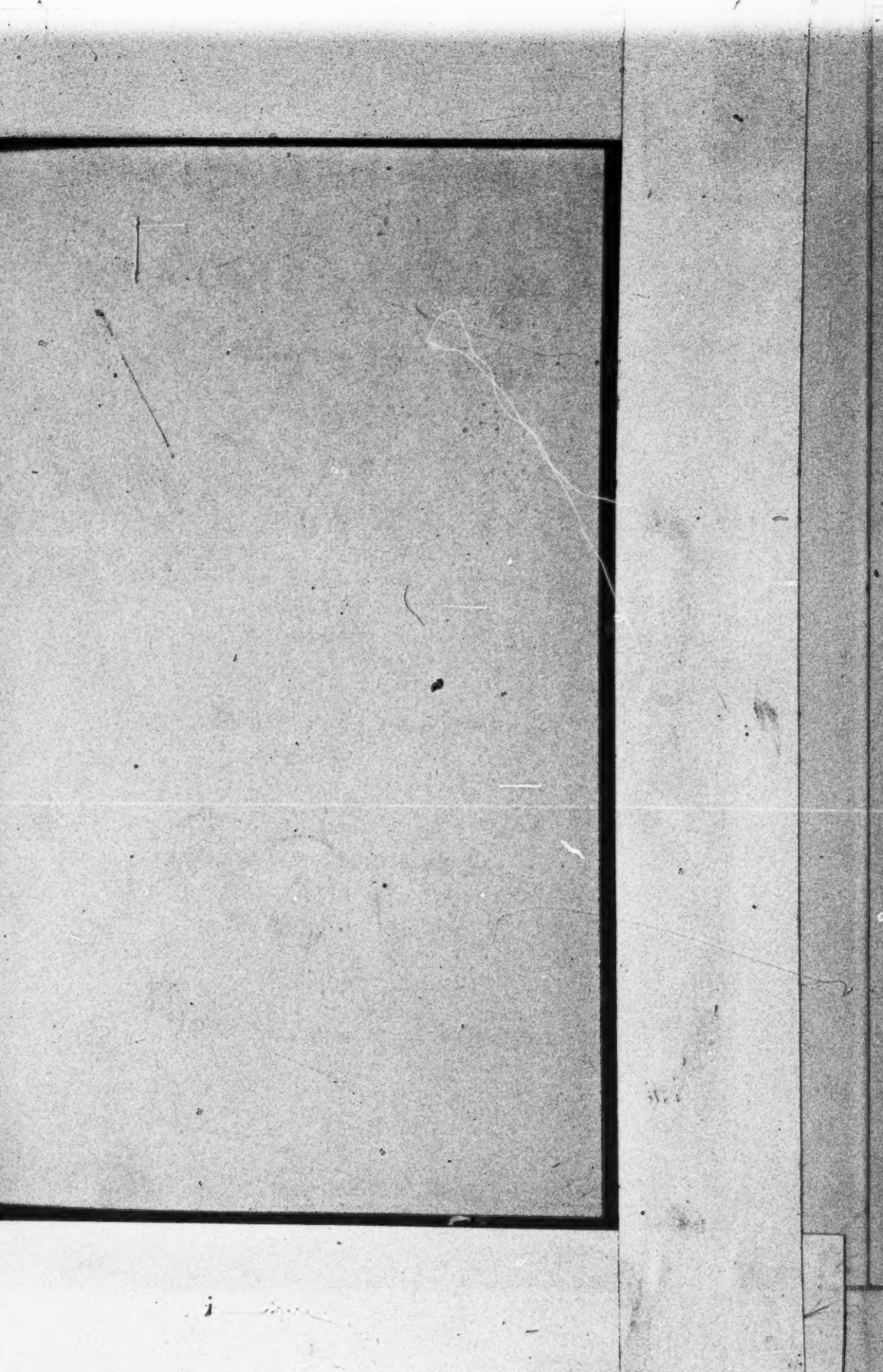
RALPH L. READ,
Counsel for Respondent, Sears, Roebuck and Co.

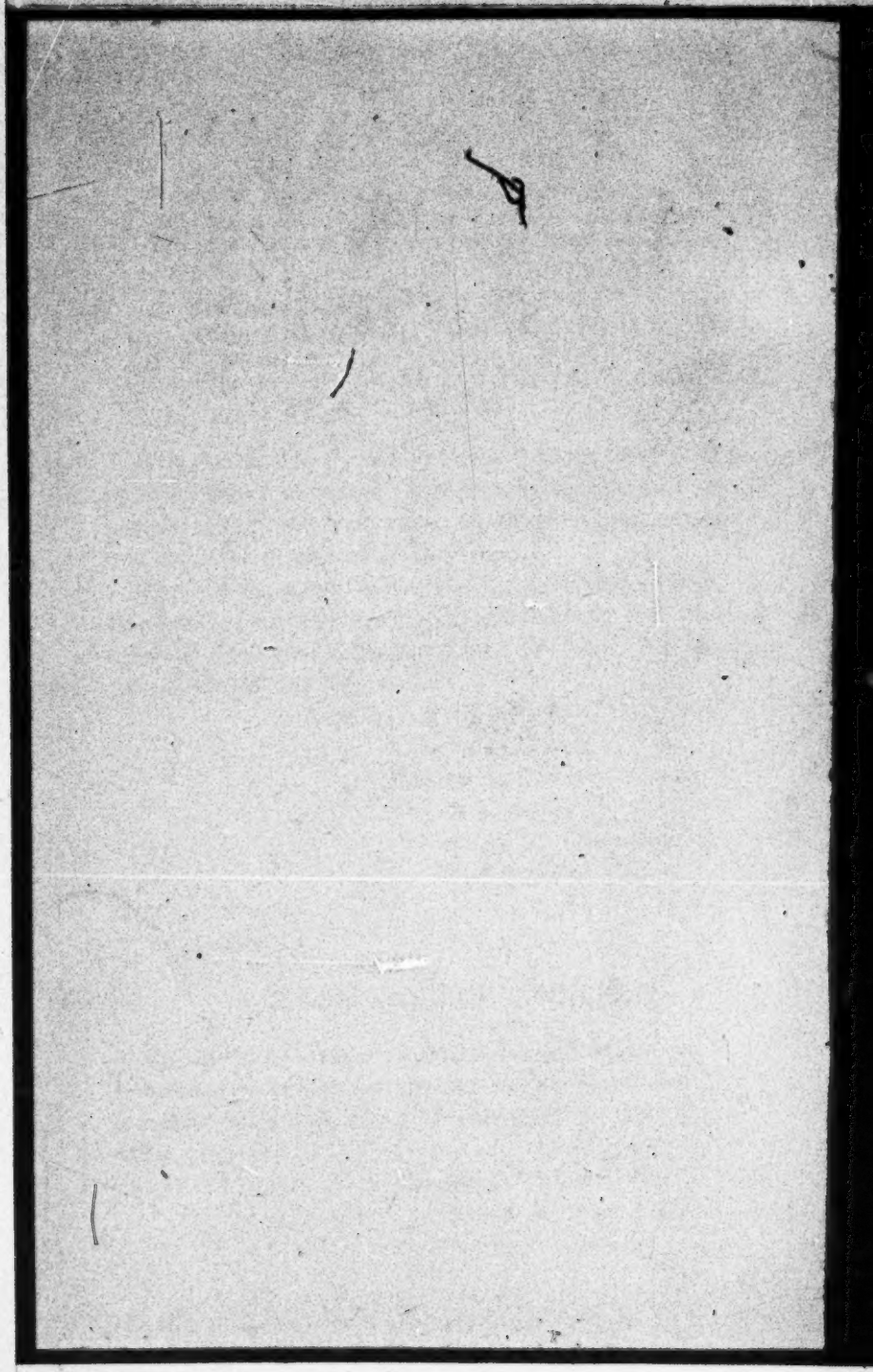
BERT L. KLOOSTER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, Joseph G. Gamble, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOSEPH G. GAMBLE,
Counsel for Respondent, Sears, Roebuck and Co.





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Supreme Court of the United States

October Term, 1940.

No. 256

FRED W. NELSON, as Chairman of the Iowa State Tax Commission, et al.,
Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

PETITION FOR REHEARING.

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Supreme Court of the United States

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Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

PETITION FOR REHEARING.

INTRODUCTION.

In petitioning for a rehearing of this case, we do not intend to reargue the principles of law discussed by the opinions in numbers 255 and 256. We assume that this Court has, by the complete absence of any reference to it in the governing opinions, determined to overrule *Connecticut General Life Ins. Co.* v. *Johnson* (1938), 303 U. S. 77, 58 S. Ct. 436, and the general principle therein enunciated, that

> "* * * the limits of the state's legislation to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state."

We assume that this Court has now determined that the several states, once they have a corporation within their jurisdiction for any purpose, may consider "the ultimate thrust of economic benefits" so extended in fixing the charge for those benefits without concern for any limit fixed by the geographic situs of transactions and objects. While we believe that the logical consequences of the overruling of the *Connecticut General* case may well be the destruction of one of the purposes of the Founding Fathers, we assume that no useful end would be served by now attempting a logical rehabilitation of an abandoned precedent.

We propose, however, to show that the opinions as written fail to dispose of the issues implicit in the record before this Court. We propose to show that, as applied to the actual facts disclosed by the record, the opinions as written contain logical inconsistencies. Furthermore, we propose to show that the record contains undisputed evidence overlooked by the opinions which on their own reasoning would require this Court to affirm the result below.

I. The Last Two Paragraphs Of The Opinion In Number 256 Misunderstand And Misinterpret the Stipulated Facts.

Before coming to the more general questions, we wish to point out that one specific portion of the opinion in number 256 is based on a misreading of the record. The last two paragraphs of the opinion quote a stipulation to the effect that

"advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward & Co.) in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog."

(R. 47-48)

On the principle that

"The effect of admitted facts is a question of law",

this stipulation was held to show the existence of a local activity with respect to "mail order sales".

While the legal effect of admitted facts is within the determination of this Court, certainly this determination must be limited to the effect of facts actually admitted and not to the effect of suppositious facts. The opinion says:

"This stipulation clearly means that respondent has solicited mail order sales in Iowa."

Since the phrase "mail order sales" has been used throughout the record as meaning sales made directly by mail, this Court apparently interpreted the stipulation as meaning that the advertisements amounted to solicitation of sales by direct mail.

This is not the fact, nor was the stipulation intended by either party to give this impression. The store advertisements referred to the ability of the *retail stores* to complete service to the customer by handling catalog orders—not to the general ability of the respondent to sell by mail order. This is the real fact. Constitutional issues must certainly turn upon the actual facts even if ambiguously stated by the inadvertence of counsel.

The meaning of the stipulation is made clear by other passages in the record. The quoted language was that of respondent's counsel; counsel for the State wished it to

be amplified to show not only the fact of such advertising, but the authorization of it, and caused this sentence to be added:

> "3. That retail stores are instructed to include in their advertising information to the public relative to the availability of the catalog service at the stores."
>
> (R. 48)

Use tax returns were made by the respondent for all sales:

> "with which their stores located in the State of Iowa had had some connection and sales made by order offices."
>
> (R. 48-49)

Each retail store had a desk to handle catalog orders for merchandise not carried by the stores:

> "We maintain a mail order service desk in each retail store with a clerk in attendance * * *."
>
> (R. 28)

But as to

> "such orders taken by the retail stores in Iowa and forwarded to the mail order houses for filling * * * the tax is being collected and paid."
>
> (R. 28)

The stipulation thus covered advertisements which the stores were instructed to run advertising the ability of the stores to "complete service"—that is, to supplement through catalog orders any lack in store merchandise. The activity of making these advertisements was merely a part of soliciting orders through the order desks in the retail stores. But as to all sales so solicited the use tax was collected and paid.

The meaning of the stipulation was clear to counsel and to the lower courts. Neither the argument of the State to this Court, nor the dissenting opinion in the Iowa Supreme Court, referred to the stipulation as showing a

closer relationship between the operations of Ward's retail stores and its mail order business than that brought about by the existence of order desks.

We respectfully submit that these two paragraphs should not be permitted to stand. With their misinterpretation of the facts, they may affect other issues to be raised before the Supreme Court of the State of Iowa.

II. The Opinions In Numbers 255 And 256 Are Internally Inconsistent In Their Treatment Of The Question Whether The Sales In Issue Were A Part Of The Business Done In Iowa Or Simply "Related" To That Business.

As we read them, the opinions are not clear on one vitally important point.

The duty of collecting use taxes is described as:

> "the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business."
>
> (Opinion in number 256)

Here the Court seems to say, with complete clarity, that the mail order sales in issue were not themselves a part of the business done in Iowa, but were among the benefits "flowing from" that business.

The same phrase is repeated elsewhere:

> "Since Iowa has extended to it that privilege (of doing business in Iowa), Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business."
>
> (Opinion in number 255)

The same thought is implicit in a later statement about the sales in issue:

> "Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa."
> (Opinion in number 286)

However, a sentence later, the opinion speaks of these sales as:

> "a part of that business though none of respondent's agents in Iowa actually solicited or placed them."

and earlier had said:

> "Yet these orders are still a part of respondent's Iowa business."

The passage ends with the conclusion that these sales might properly be included

> "in the global amount of benefits which respondent is receiving from Iowa business."

These statements on their face appear to be mutually inconsistent. Whether this Court held these sales to be "a part of the business done in Iowa" or merely part of the benefits "flowing from that business" is a point of great importance. The two possible holdings are distinct in logic, and lead to entirely different ultimate results.

We do not believe that this Court meant to hold that, in any sense which has been previously given to the language of the law, these sales formed a part of the course of respondent's Iowa business. If sales solicited and filled as these mail order sales were solicited and filled amount to business done in Iowa, then other mail order houses making sales in an identical manner are also doing business in Iowa and are subject to compulsory qualification there. Yet the opinion says of such other mail order houses:

"But these other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price."

(Opinion in number 255)

Such sales of other mail order companies represent, just as much as respondent's direct mail order sales, the "ultimate thrust of the economic benefits and burdens of transactions within the state",—the ultimate thrust of the customer transactions of merchandise selection, order making, and receipt of goods. These are the only transactions in Iowa which are directly connected with the sales in issue. If they do not make the sales of other mail order companies the doing of business in Iowa, they do not make the sales of the respondent the doing of business in Iowa.

The answer is not to be found in such a phrase as the "impotence of state power" which the opinion quotes from *Wisconsin* v. *J. C. Penney Co.*, ___ U. S. ___. If the ultimate thrust of transactions within Iowa by others entitles Iowa to impose a burden as upon business done within Iowa, the state would not be impotent to enforce the burden merely because the corporation had not qualified and appointed a statutory agent.

The point is this: the power of Iowa to impose this burden arises if at all from the fact that it is a price for benefits "flowing from" the privilege of doing business in Iowa. The one issue is whether in fact the sales in issue did "flow from" the other business actually done in Iowa.

To the extent that the language of the opinions includes phrases which customarily import different and inconsistent meanings, we submit that the opinions should be clarified and the real issue reexamined to see how the record bears upon it.

III. The Opinion Overlooks The Many Facts Which, In Addition To The Facts Referred To In The Opinions, Clearly Demonstrate That The Sales In Issue Were Not In Any Sense The Result Of "Benefits Flowing From" Respondent's Course Of Business In Iowa.

If the opinions in these companion cases are predicated on the belief that the sales in issue were among the "benefits flowing from" the business done in Iowa, we respectfully submit that the facts set forth in the record conclusively disprove the correctness of such a belief.

The opinions proceed as if the respondent's case stood or fell upon its proof that

> "there are no acts of respondent in Iowa in regard to any of the orders sent to the out of state mail order houses".
>
> (Opinion in number 255)

Such proof, says the opinion, is "immaterial" and "wholly irrelevant". Consequently:

> "It does not permit respondent to escape the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business".

The irrelevance of such facts derives from the Court's abandonment of its former rulings that:

> "* * * A state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."
>
> (*Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77 at p. 81, 58 S. Ct. 436 at p. 438)

As a consequence of Iowa's power to disregard the situs of activities over which it desires to exercise control,

> "Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa."
>
> (Opinion in number 255)

We propose to show that the rightfulness of such an assumption is conclusively rebutted by the record, even if the evidence as to the situs of respondent's activities be, standing alone, irrelevant and immaterial.

While a

> "presumption of facts supporting constitutionality * * * attaches to all legislative acts",
>
> (*Lawrence* v. *State Tax Com'n*, 286 U. S. 276 at p. 283, 52 S. Ct. at p. 558)

such presumption of the existence of facts is obviously not irrebutable. Certainly the fictional ascription to a legislature of a finding of facts which are palpably untrue is a device which a realistic Court would never adopt.

Nor has this Court adopted it. All three opinions in *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, 60 S. Ct. 504, examined the legislative assumptions of fact behind a challenged statute; and the majority of this Court held them demonstrably erroneous. And in *Best & Co.* v. *Maxwell* (No. 61, December 23, 1940), — U. S. —, this Court unanimously decided that "in practical operation" —that is, in point of fact—a state statute discriminated against interstate commerce.

We contend that the record in its entirety shows that Iowa could not "rightly assume" that the mail order sales in issue were "related to" or among the "benefits flowing from" respondent's aggregate Iowa business. Our

attack upon this statute was upon a much broader basis than the extraterritorial character of the acts of solicitation, order filling, and shipment involved in these mail order sales.

A. The relationship necessary for the imposition of the burden of tax collection must be more than the fact that all the business is handled by a single corporate entity.

If, as the opinions point out,

"Respondent cannot avoid (this) burden though its business is departmentalized"

(Opinion in number 255)

the converse is equally true; the respondent does not have to suffer the burden simply because respondent's various departments are all a part of a unitary enterprise.

Of course, no part of any unitary enterprise is completely unrelated to any other part. The financial strength derived from profits in one department help the exploitation of the business of other departments. But certainly the fact of such reciprocal relationship does not mean that a state may impose burdens on an entire enterprise of which only a small part is conducted within the state.

Suppose that respondent was qualified to do business in Iowa only in order to operate its single fence fabricating factory within the state (R. 27). Suppose that it had no stores within the state, and its mail order business was exactly comparable to those of its undomesticated competitors. No "impotence of state power" would then prevent Iowa from reaching it for the collection of the use tax. Furthermore, the profits from sales including those to Iowa customers might enhance the respondent's ability to exploit the profit possibilities of its factory. Similarly, the profits of the factory might assist the respondent in obtaining and pricing the merchandise sold by mail orders.

However, we assume that this Court would not hold that such a reciprocal relation between the parts of the unitary enterprise would be in itself sufficient to justify the imposition of burdens of the character imposed by the Iowa use tax act. This Court has never so held. It has said that the relation which must exist to support the exaction of a price for the privileges extended must always be a "fair relationship" (*McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, at p. 181, 60 S. Ct. 504, at p. 506) or a "fiscal relation" (*Wisconsin* v. *J. C. Penney Co.*, — U. S. —).

In the present case, the opinions speak of

> "the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business".
>
> (Opinion in number 256)

and of

> "the price of enjoying the full benefits flowing from its Iowa business".
>
> (Opinion in number 255)

As we read them, the opinions in the present case are predicated on the assumption that "Iowa could rightly assume" that the sales in question were among the benefits which "flowed from" the business done in Iowa, and hence "not unrelated to respondent's course of business in Iowa". The opinions do not intend to justify Iowa's assumption by the generalized relation which exists between all departments of a unitary enterprise, but by the plausible assumption that in some way the sales in question had their origin in the business actually done in Iowa.

If we are correct in this, the opinions are predicated upon an assumption which is definitely rebutted by facts shown by the record which the opinions overlook.

B. Facts overlooked by the opinions clearly rebut any assumption that the sales in question were among the benefits which "flowed out" of the business done in Iowa.

The record is entirely devoid of any evidence to support an assumption that the direct mail order business was the recipient of any "benefit flowing from" the respondent's retail store business in Iowa other than the mail order sales solicited by the stores and order offices as to which the tax was collected (Footnote 1).

Here are facts shown by the record, but not mentioned in the opinions, which demonstrate that the direct mail order sales could not "flow from", or be influenced by, the activities of the respondent within Iowa:

(1) Familiarity of Iowa customers with store merchandise would not tend to increase sales of that merchandise through direct mail order, since only 2% of the merchandise sold by mail order was carried by the stores (R. 27).

(2) The existence of the retail stores in Iowa could not improve the buying power of the respondent with respect to its acquisition of merchandise for sale by mail order, since only 2% of the mail order merchandise was identical with that sold in the stores (R. 27).

(3) Direct and uncontroverted evidence appeared in the record that the retail stores in Iowa were not intended to act as a leader and enlarger for the mail order business (R. 95).

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1. Had the Court been correct in its reading of the meaning of the stipulation referred to in the last two paragraphs of the opinion in number 354, it might have been argued that the direct mail order sales were the result of the advertisements printed for the retail stores in Iowa. But the stipulation in reality referred to something entirely different—sales made through the stores as to which the tax was collected and paid; and thus the advertisements were in no sense the "inspiration" or source of the direct mail order sales in Iowa.

(4) The prices of merchandise in the retail stores were generally higher than prices of mail order merchandise because "retail service is more expensive than mail order service" (R. 42).

(5) Direct and uncontroverted evidence appeared in the record that, through the order desks, stores attempt to divert through themselves as much of the mail order business as possible. Thus "the managers of the retail stores attempt to obtain as many mail order customers as possible" (R. 41). Far from the business done in Iowa being the source or stimulant of mail order sales, every effort is bent to convert the direct mail orders into Iowa business.

The two types of selling—through retail stores and by mail orders—thus involve differences in price, differences in buying habits of customers, and differences in the merchandise sold. These facts, taken together, clearly negative the assumption of any reciprocal relation wherein the privilege of operating a store within a state increases the mail order sales therein.

IV. The Opinions Erroneously Assume That The Iowa Use Tax Act Has Equality As Its Theme And Does Not Discriminate Against Interstate Commerce Or Against Corporations Doing Business Outside Of The State Of Iowa As Well As Within It.

The opinion in number 256 says:

> "Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where 'equality is its theme'."

This statement involves a misconception of the use tax act which in itself should, we respectfully submit, require a rehearing of the case.

Sales made within the state of Iowa carry a different and a lighter burden than sales made outside the state for use in Iowa. Some of the differences apparent on the face of the tax and use statutes may be listed as follows:

(1) The sales tax act imposes a tax upon all sales within the state and does not involve any duty to ascertain whether or not the sale is taxable, nor any problem in doing so. The use tax act imposes the duty of ascertaining whether or not merchandise purchased is to be used within the state of Iowa. Obviously the burden imposed upon the seller by the use tax act is a different and a heavier burden than that imposed upon the seller by the sales tax act.

(2) The sales tax act imposes the duty of collection at the time the tax becomes due. The use tax act requires the tax to be collected *before* the tax itself becomes due, since the use tax must be collected at the time of the sale, which is obviously appreciably earlier than the act of use which creates the tax liability.

(3) The sales tax act does not leave room for the necessity of any claims for refund, since the act of sale causes the imposition of the tax. Under the use tax act, the seller may be forced to have later negotiations with the buyer should the buyer after making a purchase intended for use within Iowa actually decide not to use the merchandise there. Incidentally, no provision for a refund of tax already turned over to the state is provided by the use tax act so that in actual effect a tax may be required to be collected and paid over to the state in instances where later events determined that no tax was due. This cannot happen under the sales tax act.

(4) The seller under the use tax act may be required by regulation to give the buyer a receipt for the use tax collected. No such duty may be imposed by the sales tax upon the seller under it.

Enough has been said to demonstrate that by the very terms of the two statutes the Iowa use tax act imposes a different and a much more onerous burden upon the seller than does the Iowa sales tax act.

The argument at this point is not of a kind which may be properly characterized with the language of the opinion in number 255:

> "Respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents."

The argument here is not based upon the method by which the respondent does business but by the fact that the tax is required to be collected under the use tax act at a time when the liability for the tax is not accrued. The difference in the burdens imposed is not due to the method of doing business selected by the respondent but to the different type of duty imposed by the statute.

We respectfully submit that the opinions thus overlook and omit to discuss sound reasons why the challenged statute is unconstitutional, whether because it be regarded as a discrimination against the interstate commerce involved in the mail order sales in issue, or whether it be considered as a discrimination against corporations doing business without as well as within the state in violation of the due process clause (Footnote 2).

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2. The prohibition inherent in the Fourteenth Amendment against state legislation which discriminates against corporations doing business without as well as within the state has been applied by this Court in such cases as Bethlehem Motors Corp. v. Flynt, (1941) 254 U. S. 471, 61 S. Ct. 571.

SUMMARY.

We respectfully request a rehearing of the decision in this case, not only because the opinions announce a radical departure from precedents previously recognized by this Court, but because the opinions clearly overlook certain facts which on the logic employed by the opinions themselves would require the affirmance of the decision of the Supreme Court of Iowa. We feel that a rehearing should also be granted because of the fact that the opinions indicate that this Court did not fully understand the meaning of the facts disclosed by the record and the actual operation of the challenged statute.

Respectfully submitted,

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Certificate of Counsel.

I, Stuart S. Ball, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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